IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THRIVEST SPECIALTY FUNDING, LLC	:	
	:	
v.	:	Civil Action No. 2:18-CV-1877
	:	
WILLIAM E. WHITE	:	

THRIVEST'S MEMORANDUM OF LAW IN SUPPORT OF ITS EMERGENCY MOTION TO CONFIRM ARBITRATION AWARD
[FILED UNDER SEAL]

Thrivest Specialty Funding, LLC ("Thrivest") submits this memorandum of law in support of its emergency request to confirm the Emergency Arbitrator's Interim Award of Emergency Relief (the "Award") in Thrivest Specialty Funding, LLC v. White, AAA Case No. 01-18-0001-4765 (the "Arbitration").

I. BACKGROUND AND RELEVANT FACTS

In December 2016, Thrivest provided Respondent William E. White ("White") with a $500,000 advance on his potential recovery in the NFL Concussion Litigation. See Agreement (Dkt. 1-3, Exhibit A). White has refused—and continues to refuse—to honor their Agreement. To date, despite having the use and enjoyment of Thrivest's advance for more than two and a half years and receiving a $3.5 million award in the NFL Concussion Litigation triggering his payment obligations, White has not paid Thrivest anything.

Thrivest commenced this action against White, seeking to compel White to participate in the Arbitration pursuant to the agreement to arbitrate at Section 6(z) of their Agreement. See Complaint to Compel Arbitration (Dkt. 1). The Court dismissed the action on August 30, 2018, citing its May 22, 2018 Explanation and Order in the NFL Concussion Litigation enjoining Thrivest from proceeding with the Arbitration. (Dkt. 13). After Thrivest appealed, the Third Circuit vacated the injunction and the order dismissing this action, remanding for further

proceedings. See Thrivest v. White, No. 18-3005, 2019 WL 1868828, *11 (Apr. 26, 2019). On May 20, 2019, the Third Circuit issued its mandate.

On April 26, 2019, following the Third Circuit's decision, Thrivest notified the American Arbitration Association that the injunction had been vacated and the Arbitration resumed with proceedings on Thrivest's application for emergency relief (Dkt. 1-3) under Rule 38 of the AAA Commercial Rules. Previously, AAA had appointed Hon. Steven I. Platt (Ret.) to serve as the Emergency Arbitrator and to decide Thrivest's request for injunctive relief—i.e., that White escrow funds pending resolution of the Arbitration on the merits. See Appointment of Emergency Arbitrator, Exhibit A. Judge Platt held a scheduling call with the parties on May 8, 2019. Later, on May 15, 2019, White filed an Answering Statement contesting AAA's jurisdiction—among other things, because Thrivest did not first mediate the dispute. Thereafter, Judge Platt held a telephonic hearing on Thrivest's application. Although White ignored a notice to attend and did not participate in the hearing, his attorney Robert Wood, Esquire, participated and opposed Thrivest's application, arguing that AAA lacked jurisdiction and that Thrivest had not established circumstances justifying injunctive relief.

On June 4, 2019, Judge Platt issued a Determination and Award (the "Determination") and an Interim Award of Emergency Relief (the "Award") pursuant to AAA Rule 38, which authorizes the Emergency Arbitrator to award emergency relief in the case of "immediate and irreparable loss or damage." See Determination and Award, Exhibits B and C respectively. Judge Platt flatly rejected White's jurisdictional challenge, describing it as not credible and "disingenuous." See Determination at 10-13 (Exhibit B). Finding he had jurisdiction to adjudicate Thrivest's application, Judge Platt noted, "to use the formal notice and meeting requirements contained within what [White] considers to be a 'False Assignment' with no

binding legal effect in an attempt to defeat the Agreement's arbitration mandate, when it is clear [White] had and continues to have no intention of mediating this dispute, is unpersuasive at best." Id. at 13.

Turning to the merits of the injunction, Judge Platt found that "there is a strong likelihood that [Thrivest] will prevail on the merits of this case and that Thrivest's Agreement with [White] will be enforced pursuant to the terms contained therein." Id. at 17. Further, Judge Platt explained, Thrivest "has demonstrated a real likelihood that the settlement funds distributed to Mr. White are in danger of being dissipated, if not already dissipated, such that [Thrivest] will be unable, if successful on the merits, to collect the money owed it pursuant to the Agreement." Id. Accordingly, Judge Platt issued the Award, directing White to escrow $1,250,000 "into the trust account of his attorney, Robert C. Wood, Esq. … pending and subject to a Final Award, further order of the arbitrator, or written agreement signed by the parties." See Award (Exhibit C). An injunction directing the escrow of funds only, Judge Platt's Award makes clear that "deposit of the Escrowed Funds as set forth herein shall not alter the parties' rights and obligations under the Agreement". Id.

White did not comply with the Award and, on June 11, 2019, Attorney Wood confirmed that White contests the Award and AAA's authority to issue it. Thrivest brings this emergency motion to confirm the Award and for an order directing White to comply as ordered by the Emergency Arbitrator. Because Thrivest's Complaint to Compel Arbitration (Dkt. 1) is pending and White has filed a Counterclaim (Dkt. 19) contesting AAA's jurisdiction for the same reasons rejected by Judge Platt as "unpersuasive at best," Thrivest respectfully requests that the Court also direct White to arbitrate and to stay these proceedings in favor of the Arbitration.

II. STANDARD OF REVIEW

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 9, provides that, "within one year after the award is made, any party to the arbitration may apply to the court so specified for an order confirming the award and thereupon the court must grant such an order unless the award is vacated, modified, or corrected." 9 U.S.C. § 9. The Agreement satisfies this requirement because it authorizes Thrivest to "enforce any award rendered pursuant to the arbitration provisions … by moving to compel the award in the appropriate Pennsylvania court. See Agreement at 6(aa) (Dkt. 1-3, Exhibit A).

The standard of review of an arbitration award is very deferential. Authority to vacate an award is limited to those rare instances where there is "absolutely no support at all in the record justifying the arbitrator's determinations." Jeffrey M. Brown Assoc., Inc. v. Allstar Drywall & Acoustics, Inc., 195 F.Supp.2d 681, 684 (E.D. Pa. 2002). The FAA expressly limits the power of a reviewing court to vacate or modify an arbitration award to the following circumstances:

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. §10(a). The Third Circuit also recognizes a fifth ground for vacatur in "exceptional cases" where there is a demonstrable "manifest disregard of the law." Popkave v. John Hankcock Distrib., LLC, 768 F.Supp.2d 785, 789 (E.D. Pa. 2011); see also Southco, Inc. v. Reel Precision Mfg. Corp., 556 F.Supp.2d 505, 511 (E.D. Pa. 2008) (holding "the Court must affirm

the award unless [it is] completely irrational . . ." which necessitates a showing that the decision "escape[s] the bounds of rationality."). This judicially-created exception must only be applied in the rarest of circumstances where it is readily apparent from the record that the arbitrators willfully ignored applicable law. Id. at 790. The Court can also modify or correct an arbitration award to address clerical errors that do not go to the merits of the award. See 9 U.S.C. §11(a)-(c). None of these exceptions apply and so the Court should confirm the Award.

III. ARGUMENT

Judge Platt had authority and jurisdiction to issue the Award and the Court has authority and jurisdiction to confirm the Award. There are no grounds to vacate, modify or correct it. Thrivest respectfully requests that the Court confirm the Award and issue an order in the form proposed.

A. The Parties Authorized The Emergency Arbitrator To Issue Injunctive Relief; This Court Lacks Jurisdiction To Consider White's Jurisdictional Challenge.

Thrivest and White specifically agreed that "the arbitrator shall have authority to grant injunctive relief or other forms of equitable relief to either party." See Agreement at 6(aa) (Dkt. 1-3, Exhibit A). There can be no doubt that Judge Platt had authority to issue the Award and to require that White escrow funds pending a decision on the merits.

Likewise, there can be no doubt that Judge Platt had jurisdiction over Thrivest's application for emergency relief under AAA Rule 38 (titled "Emergency Measures of Protection"). White argued that AAA lacked jurisdiction because Thrivest did not first mediate this dispute, but Judge Platt rejected his argument, characterizing it as "disingenuous" considering that White has refused even to recognize the Agreement as binding on him. See Determination at 10-13 (Exhibit B). White's Counterclaim asks the Court to consider the identical "condition precedent" issue; however, the Supreme Court of the United States has made

clear that "procedural questions which grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator, to decide." Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84 (2002) (emphasis in original, internal quotations omitted) (noting that application of a condition precedent to arbitrability is such a procedural question that must be decided by the arbitrator); see also John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 556-558 (1964) (making clear that pre-arbitration mediation is a question of procedural arbitrability that must be decided by the arbitrator). Pennsylvania law is in accord. See Interdigital Com., Corp. v. Fed. Ins. Co., 392 F.Supp.2d 707, 716 (E.D. Pa.) (citing Ross Dev. Co. v. Advanced Bldg. Dev., Inc., 803 A.2d 194, 197 (Pa. Super. 2002), and explaining "[u]nder Pennsylvania law, the procedural issue of whether a condition precedent to arbitration has been met is for an arbitrator to decide."). Accordingly, although White may revisit his jurisdictional challenge in the arbitration now that the emergency measures of protection hearing has concluded, he may not do so here. His challenge does not bear on the Court's confirmation of Judge Platt's Award.

Finally, because White's counterclaim and challenge raise issues that must be decided by the arbitrator rather than the Court, the Court should enter an order on Thrivest's Complaint seeking to compel arbitration and stay this action in favor of the Arbitration. See Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 449 (2006) ("[A] challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.").

B. The Court Should Confirm The Award Because It Disposes Of An Independent Claim For Emergency Relief And, Without Immediate Confirmation, The Award Lacks Meaning.

Judge Platt directed that White escrow funds pending resolution of the parties' dispute on the merits to avoid "ongoing, irreparable harm." See Determination at 19 (Exhibit B). However, "[a]rbitrators have no power to enforce their decisions[;] [o]nly courts have that power." See Recyclers Ins. Group, Ltd. v. Ins. Co. of North America, No. 91-503, 1992 WL 150662, *3 (E.D.

Pa., June 15, 1992) (citing Pacific Reins. Mgt. Corp. v. Ohio Reins. Corp., 935 F.2d 1019, 1023 (9th Cir. 1991)). As a final order authorized by the parties' arbitration agreement, the Award is enforceable by confirmation here. See Meadows Indem. Co., Ltd. v. Arkwright Mut. Ins. Co., No. 88-0600, 1996 WL 557513, *7 (E.D. Pa., Sept. 30, 1996) (confirming arbitrators' injunction and holding that "an arbitration panel ordering a party to post security before a panel will consider the merits may rationally derive such an award from a contract [even where it] does not expressly provide that it may impose such an award."). Indeed, "temporary equitable orders calculated to preserve assets or performance needed to make a potential final award meaningful … are final orders that can be reviewed for confirmation and enforcement by district courts under the FAA." Pacific Reins. Mgt. Corp., 935 F.2d at 1023.

It is settled law that "[t]emporary equitable relief in arbitration may be essential to preserve assets or enforce performance which, if not preserved or enforced, may render a final award meaningless." Id. at 1022–23. That is because "if temporary equitable relief is to have any meaning, the relief must be enforceable at the time it is granted, not after an arbitrator's final decision on the merits." Id. at 1023 (citing Southern Seas Navigation Ltd. v. Petroleos Mexicanos, 606 F.Supp. 692, 694 (S.D.N.Y.1985)).

Judge Platt found it likely that Thrivest would prevail on the merits and enforce White's promises in the Agreement, but also that there was a serious risk that White would become judgment proof in the interim without relief. The Court should confirm Judge Platt's Award to preserve the status quo pending the ultimate outcome of the Arbitration.

IV. CONCLUSION

For the foregoing reasons, Thrivest respectfully requests that the Court confirm the Award and enter an Order in the form proposed.

Respectfully submitted,

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